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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 820

ALFRED G. SICA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the district court denying the motion for acquittal or for new trial (O.R. 48–60)[1] is not reported. The opinion of the court of appeals is reported at 325 F. 2d 831.

JURISDICTION

The judgment of the court of appeals (Pet. App. 21) was entered on November 18, 1963, and a petition for rehearing was denied on January 13, 1964 (Pet.

[1] The record in this court consists of two volumes: The reporter's typewritten transcript of the proceedings at the trial, designated herein as "R."; and the clerk's original record of all other proceedings in the case, including those in the court below, designated herein as "O.R."

App. 25). The petition for a writ of certiorari was filed on February 10, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the verdict.

2. Whether the trial court improperly admitted certain evidence to which objection was made on the ground that it was hearsay.

STATUTE INVOLVED

18 U.S.C. 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

Petitioner was indicted in the United States District Court for the Southern District of California on March 17, 1961, on charges of (1) wilfully attempting to evade his individual income taxes for the year 1957, in violation of Section 7201 of the Internal Revenue Code of 1954; and (2) wilfully making a false and fraudulent statement in a matter within the jurisdiction of the Internal Revenue Service,

in violation of Section 1001 of the Criminal Code. (O.R. 2–5.) After a jury trial he was acquitted on the first count, convicted on the second, and sentenced to serve three years in prison and to pay a $2,000 fine. (O.R. 44.)

Count II, on which petitioner was convicted, alleged, *inter alia*, that the false statement was made on November 13, 1958, when he stated in an affidavit that (O.R. 4–5):

> Since Mr. Michael Cohen was released from prison on October 9, 1955, I have been a personal friend of Mr. Cohen and associated with him in a purely social manner.
>
> Since January 1, 1955, I have not received any moneys from Mr. Cohen; nor have I paid any moneys to Mr. Cohen. During the period January 1, 1955, to date, I have not received any moneys from anyone acting on Mr. Cohen's behalf; nor have I paid any moneys to anyone on Mr. Cohen's behalf.
>
> During the period January 1, 1955, to date, I have had no business connections or negotiations with Mr. Cohen, directly or indirectly * * *.

The indictment further alleged that in fact petitioner well knew that he had participated in financial transactions to which Cohen was a party, that petitioner had associated with Cohen in other than a purely social manner, and that he had business connections and negotiations with Cohen during the pertinent period. (O.R. 4–5.)

The evidence of petitioner's guilt on this count may be summarized as follows:

In the latter part of 1957, there was unusually severe competition in California between two cigarette vending machine companies, Coast Cigarette Service and Rowe Service Company ("Coast" and "Rowe"). In order to obtain locations in which to install their vending machines, Coast and Rowe began paying location owners cash bonuses and advances against future earnings which averaged about 50% higher than the usual rates. (R. 19–21, 28, 107, 121.) Breen, a salesman for Coast (R. 8–9), first met petitioner in 1957 at the office of a distributor for manufacturers of vending machines (R. 10, 25). Breen, petitioner and the distributor all went to the apartment of Michael Cohen—who had been a friend of petitioner for about 25 years (R. 66, 94)—and there engaged in a discussion of coffee vending machines (R. 11–12). Breen again met petitioner late in 1957 at the office of the same distributor. There was a conversation touching on the subject of cigarette machines and petitioner asked Breen to introduce him to his superior, Carr (R. 12–13)—the manager and vice-president of Coast (R. 25)—because petitioner wanted to get some machine locations for Coast (R. 12–14). Petitioner stated that his services would be worth about $25,000 to Coast (R. 15), but Carr did not appear to be interested in the proposal and the introduction was never made (R. 17–18, 27).

Rowe's California offices were in charge of one Seedman (R. 28, 45), who, late in 1957, called in two members of a New Orleans affiliate of Rowe—Vaughn and Angelo—to assist him in the competition with Coast (R. 38, 44–49, 53–54, 123). There was a dis-

cussion in the apartment of one McCoy among Cohen, petitioner, Angelo, Vaughn and McCoy (R. 33, 36–39, 50–53), relating to the efforts of Coast to get Cohen to "help them out" against Rowe (R. 53) and in Rowe's interest in having Cohen remain "neutral, not hurting [Rowe] in any way * * *." (R. 54).

On November 27, 1957, Seedman cashed a [Rowe] company check for $5,000, obtaining fifty $100 bills which he put into a white envelope. (R. 125–126.) Seedman turned the envelope over to Vaughn on the same day (R. 126) after which Seedman and Vaughn went to lunch at the "Brown Derby" with petitioner and Cohen (R. 127). During the lunch Vaughn handed the envelope to Cohen, who said, "That should be Fred's" (R. 128), meaning petitioner (R. 127), or, "This should go to Fred" (R. 129), whereupon Vaughn handed the envelope to petitioner (R. 131–132). A few days later, Vaughn wrote two checks to Cohen totalling $3,000 and caused them to be delivered to Cohen, who negotiated them. (Govt. Exs. 6, 7; R. 74–78, 111–112.)

Upon Vaughn's return to New Orleans in mid-December, 1957 (the competitive situation between Coast and Rowe having eased somewhat following his and Angelo's visit to Los Angeles—R. 64), Vaughn wrote to Seedman, forwarding an invoice detailing his expenses in the amount of $3,558.50, and asking—in the transmittal letter—that Seedman reimburse him and add $3,000 to the total to cover the two checks which Vaughn had "advanced to M.C. for which I [Vaughn] have borrowed the money from [Rowe's New Orleans affiliate] to cover same" (Govt.

Ex. 10; R. 138, 145–146). Seedman drew a check in Vaughn's favor on Rowe's account dated December 24, 1957, in the amount of $3,558.50 to cover Vaughn's expenses. (Govt. Ex. 11; R. 136–137.) Seedman drew another Rowe check in his own favor to cover the $3,000 advance (Govt. Ex. 12; R. 137), and a personal check against his (Seedman's) account in favor of Vaughn for $3,000 (Govt. Ex. 13; R. 138). Neither Seedman nor the Rowe organization has ever been repaid any of the $5,000 turned over to petitioner in currency (*supra*, p. 5) or the $6,558.50 paid to Vaughn by the above checks. (R. 147.)

ARGUMENT

1. There is no substance to the argument (Pet. 20–27) that the evidence was insufficient to support the jury's verdict of guilty. The evidence briefly sketched above points clearly to the conclusion that petitioner knowingly lied when he submitted the affidavit in question to officials of the Internal Revenue Service after clearing it with his attorney (R. 159–160); that his relationship with Cohen—whose tax liability the Service was investigating (Pet. App. 3)—far from being a "purely social" one (*supra*, p. 3), involved substantial financial dealings which might well have thrown light on Cohen's true income tax liability; and that his receipt from Seedman of the $5,000 in currency, standing alone, establishes the falsity of petitioner's sworn statement that he had "had no business connections or negotiations with Mr. Cohen, directly or indirectly * * *" (*supra*, p. 3). The contention that the $3,000 payment from

Seedman to Cohen (transmitted through Vaughn—Pet. 21–22) was merely a loan not only emphasizes unduly the importance of this particular transaction but relies entirely upon the highly dubious testimony of Cohen. The trial judge quite properly denied the motion for acquittal.[2]

Petitioner also argues (Pet. 22–27) that Congress did not intend that Section 1001 should apply to the kind of situation presented by this case. He suggests that Section 1001 overlaps the perjury statute (18 U.S.C. 1621) and hence this Court should "clarify this situation and prevent any duplication or overlapping of the statutes" (Pet. 23). It is, of course, frequently true that a single act or transaction violates more than one provision. *United States* v. *Beacon Brass Co.*, 344 U.S. 43, 45; *United States* v. *Gilliland*, 312 U.S. 86, 95–96; *United States* v. *Noveck*, 273 U.S. 202, 206–207. The short of the matter is that Section 1001, when construed, as it should be, "according to its literal and natural import" (*United*

[2] In denying the motion for acquittal, the district judge stated (O.R. 57):

"There is direct evidence of Sica's approach to Coast with the suggestion that he had a deal where he thought his services would be worth in the neighborhood of $25,000 to Coast. He was subsequently present at all the key times and places in the negotiations between Vaughn, Seedman and Cohen. The defendant was present at McCoy's when Angelo overheard the discussion with respect to Vaughn's interest in Mickey Cohen remaining neutral. There is direct testimony that Cohen said that the envelope Vaughn laid on the table at the Brown Derby belonged to "Fred". The jury could properly find from Seedman's testimony that he (Cohen) did not take it. The court and jury would be naive indeed to conclude that the defendant's participation in these various meetings was in 'a purely social manner.'"

States v. *Gilliland, supra,* pp. 90–91), manifestly covers the offense charged in this indictment and there is no reason why the legislative intent "should be frustrated by construction" (*Id.,* p. 93). See also, *United States* v. *Bramblett,* 348 U.S. 503, 509–510; *United States* v. *McCue,* 301 F. 2d 452, 455 (C.A. 2d), certiorari denied, 370 U.S. 939; *Spivey* v. *United States,* 109 F. 2d 181, 184–185 (C.A. 5th); *United States* v. *Silver,* 235 F. 2d 375, 377 (C.A. 2d).

Nor can there be any question that petitioner's affidavit was false in material respects, bearing directly, as it did, upon the Internal Revenue Service's investigation of Cohen's income tax liability. Indeed, as the court below pointed out (Pet. App. 4), petitioner made no objection to the trial judge's charge to the jury that "Materiality is a question for the court, and I charge you as a matter of law that the statements alleged in Count Two of the Indictment were pertinent to the issue pending within the jurisdiction of the Internal Revenue Service."

2. Also without merit is the contention (Pet. 14–20) that the district court erred in admitting in evidence Government Exhibits 10 through 13, Vaughn's invoice to Seedman, the transmittal letter which accompanied it, and the three checks written by Seedman to reimburse Vaughn (*supra,* p. 6). The court below (Judge Foley dissenting) disposed of the point on the ground that the exhibits did not appear to have been admitted as proof of the truth of the matters asserted therein, but merely as "further evidence that Vaughn and Seedman's relationships, which, as shown

by other evidence, also included Cohen and Sica, were of a business character." (Pet. App. 9.)[3] In addition, even assuming that the exhibits were admitted without any such limitation, they were admissible under the federal shop-book statute, 28 U.S.C. 1732. The question of admissibility arises mainly because Vaughn died before the trial (R. 44–45) and hence could not authenticate Exhibit 10 as his letter and invoice to Seedman. However, the purpose of the shop-book statute is to eliminate the need for the testimony of the person who made the record. *Palmer* v. *Hoffman*, 318 U.S. 109, 113. A copy of a letter kept in the usual course of business (as this apparently was) is admissible under the statute if there is satisfactory evidence that the original has been mailed. *Sheehan* v. *Municipal Light & Power Co.*, 151 F. 2d 65, 69 (C.A. 2d). Here, Seedman's possession of Government's Exhibit 10—together with the three canceled checks issued in response thereto (Government's Exhibits 11, 12 and 13)—is ample proof that the original was indeed mailed. And if a copy of the letter is admissible as a business record, certainly the three canceled checks—related so closely

[3] Although the record does not embrace what appear to have been rather extensive arguments on the admissibility of these documents (R. 141–144), the trial court, in its memorandum denying petitioner's motion for judgment of acquittal or for a new trial, stated (O.R. 58; Pet. App. 8):

"Where, however, it is relevant and material to a case that a statement was in fact made or that a conversation or discussion had in fact been held and no effort is made to use the statement or conversation as proof of the truth of the matter asserted, such evidence is not barred by the rule excluding hearsay evidence."

to the letter in dates and amounts—are also admissible on the same basis.[4]

Finally, assuming *arguendo* that the four exhibits were erroneously admitted, there is no showing of prejudice to petitioner. The material facts embodied in these documents were already in evidence through Seedman's testimony and the evidence of other witnesses, and thus the challenged exhibits were, as the court below found, "purely cumulative" (Pet. App. 11). Compare *Smith* v. *Bear*, 237 F. 2d 79, 89 (C.A. 2d).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] We submit that there is no doubt, as a practical matter, that Government's Exhibit 10 was a record kept in the usual course of the business of Rowe Service Company, Inc. It was not addressed to Seedman personally but to Seedman as president of that corporation (R. 145) and the invoice is headed "New Orleans Cigarette Service Corp." (R. 146). Both corporations are subsidiaries of the same parent company (R. 122–123) and, although Seedman initially objected to paying the amounts in question (R. 139–140), he did so when the parent company authorized payment (R. 149). Government's Exhibit 10, therefore, is the voucher retained by Rowe Service Company, Inc. as the basis for the payments made by it to Vaughn by means of the corporation's checks, Government Exhibits 11, 12 and 13. (See pp. 5–6, *supra*.)

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